

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**

Date: **20 June 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision
on Defence Third Request to Add 12 Items to its List of Evidence**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67 and 82(1)(d) of the Rome Statute issues the following ‘Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence’.

I. Procedural history and submissions

1. On 15 May 2019, the Defence filed a request to add 12 items to its list of evidence.¹ The Single Judge granted the request with regard to nine items, and rejected it in relation to the remaining three.²
2. On 31 May 2019, the Defence filed a motion for the Chamber to reconsider the Impugned Decision or, in the alternative, requesting leave to appeal it, in relation to the three items the addition of which was rejected.³ Specifically, the Defence submits that ‘new arguments that cannot be seen to have been contemplated by the Chamber in delivering the impugned Decision’ justify reconsideration of rejecting the addition of three items to its list of evidence.⁴ The Defence ‘accepts any responsibility that may be attributed to it for not having previously adduced some of the particular arguments’ put forward in the Request,⁵ but at the same time argues that reconsideration is necessary due to an ‘error of reasoning’ in the Impugned Decision.⁶
3. Turning concretely to the three items which the Defence seeks to add to its list of evidence, the Request argues that the addition of item UGA-D26-0015-1212 would ‘complete[] the record of evidence’⁷ and that the reasoning in the Impugned Decision is ‘inconsistent with the correct reasoning provided in Decision 1314’.⁸ The Defence also submits that the item is relevant as such, as it ‘shows a different aspect of the hearing that

¹ Defence Third Request to Add 12 Items to its List of Evidence, ICC-02/04-01/15-1513 (the ‘Initial Request’).

² Decision on Defence Third Request to Add 12 Items to its List of Evidence, 24 May 2019, ICC-02/04-01/15-1523 (the ‘Impugned Decision’).

³ Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence, ICC-02/04-01/15-1527 (the ‘Request’).

⁴ Request, ICC-02/04-01/15-1527, para. 6.

⁵ Request, ICC-02/04-01/15-1527, para. 8.

⁶ Request, ICC-02/04-01/15-1527, para. 1.

⁷ Request, ICC-02/04-01/15-1527, para. 9.

⁸ Request, ICC-02/04-01/15-1527, para. 10.

cannot be captured solely from the associated written transcript(s).⁹ With regard to the other two items, the Defence argues that they concern the nature of relations between witness P-0235 and the accused, which is significant to the charges and the defences presented.¹⁰

4. Alternatively to its request for reconsideration, the Defence requests leave to appeal the Impugned Decision, identifying the issue as ‘whether the Single Judge has erred in his reasoning by not allowing the Defence to add items 1212, 3999, and 4000 to the LoE thereby violating his obligations under Article 64(2) of the Statute [...]’.¹¹ According to the Defence, resolution of this matter is crucial to settle the Initial Request, *i.e.* to have the three items added to its list of evidence, and for both fairness and expeditiousness since failure to add the items at this stage would not be in the interests of fairness as they possess probative value to the charges, and would prompt another request in the future, thereby impacting the expeditiousness of the proceedings.¹²
5. On 7 June 2019, the Office of the Prosecutor (the ‘Prosecution’) submitted its response, arguing that the Request should be rejected as the criteria neither for reconsideration nor for granting leave to appeal have been met.¹³ According to the Prosecution, the Request does not demonstrate any error of reasoning, fails to show the necessity of reconsideration for the purpose of preventing injustice, and the issue identified does not arise from the decision, nor impacts on the fair and expeditious conduct of the proceedings or outcome of the trial and immediate resolution by the Appeals Chamber would not materially advance the proceedings.¹⁴

⁹ Request, ICC-02/04-01/15-1527, para. 12.

¹⁰ Request, ICC-02/04-01/15-1527, paras 14-15.

¹¹ Request, ICC-02/04-01/15-1527, para. 17.

¹² Request, ICC-02/04-01/15-1527, paras 18-19.

¹³ Prosecution’s Response to Defence’s ‘Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence’, ICC-02/04-01/15-1540 (the ‘Response’), para. 1.

¹⁴ Response, ICC-02/04-01/15-1540, para. 2.

II. Analysis

6. At the outset, the Single Judge recalls the prior decisions setting out the criteria for reconsideration,¹⁵ as well as the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁶

i) Request for reconsideration

7. First in light of the request of the Defence to reconsider the Impugned Decision in part, the Single Judge is of the view that the Defence has not demonstrated in which way the exceptional remedy of reconsideration would be justified. While the Defence now presents arguments which could equally have been raised in the Initial Request, it does not specify in which way the Impugned Decision is flawed by an error of reasoning which would justify its reconsideration. Nor does the Request provide persuasive arguments that reconsideration is necessary to prevent an injustice.

8. In particular with regard to item UGA-D26-0015-1212, the Single Judge notes that the reasoning from the decision referred to by the Defence¹⁷ is not directly applicable to the case at hand which concerns the transcript of the current trial proceedings taking place in front of the Chamber, rather than other audio-visual material submitted to the Chamber as evidence in these proceedings. Similarly, the arguments now presented according to which the item is ‘relevant evidence on its own merit’¹⁸ and should be added ‘to ensure the expeditiousness of the proceedings’¹⁹ equally do not demonstrate without anything further how specifically the Impugned Decision in this respect is flawed. With regard to the alleged relevance of the item, the Defence in fact merely repeats what had been

¹⁵ Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence, 23 February 2017, ICC-02/04-01/15-711, para. 4; Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, 26 March 2018, ICC-02/04-01/15-1210, para. 6; Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para. 12.

¹⁶ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

¹⁷ See Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314.

¹⁸ Request, ICC-02/04-01/15-1527, para. 12.

¹⁹ Request, ICC-02/04-01/15-1527, para. 13.

submitted in the Initial Request.²⁰ Therefore, the Request fails to demonstrate in which way the reasoning on this matter in the Impugned Decision is erroneous.

9. In addition, the Defence does not present arguments demonstrating that reconsideration in relation to this item would be necessary to prevent an injustice. While the Defence submits that the video recording ‘shows a different aspect of the hearing that cannot be captured solely from the associated written transcript(s)’, it does not specify what that ‘different aspect’ would entail, for what purpose it is necessary and how specifically it could not be captured from the transcript. Additionally, such arguments continue to miss the point that the Defence can rely upon what happened at the commencement of trial without formally submitting the hearing recording into evidence.²¹ Without more, it remains unclear for which reason reconsideration of the Impugned Decision with regard to this item – *i.e.* allowing its addition to the Defence list of evidence – would be necessary to prevent an injustice.
10. Considering items UGA-D26-0018-3999 and UGA-D26-0018-4000, the Single Judge is of the view that the Defence also does not demonstrate an error of reasoning which would justify reconsideration of the Impugned Decision.
11. At the same time, however, the Single Judge is cognisant of the fact that the initial rejection of the items’ addition to the Defence list of evidence was based on the failure to present any arguments on their prospective significance,²² and that the Request now argues that the items concern the nature of relations between witness P-0235 and Mr Ongwen.²³
12. While the request for reconsideration of the Impugned Decision is not adequately substantiated, the Single Judge allows, on an exceptional basis, the Defence to add items UGA-D26-0018-3999 and UGA-D26-0018-4000 to its list of evidence. This is done in light of the arguments now presented in the Request – which, the Single Judge repeats, could and should have been presented in the Initial Request –, the fact that both items are

²⁰ See Initial Request, ICC-02/04-01/15-1513, para. 23 (‘demonstrate the non-guilty plea entered by Mr Ongwen’) and Request, ICC-02/04-01/15-1527, paras 12 (‘highly relevant to the charges as it depicts the key moment where Mr Ongwen enters his not guilty plea’) and 20 (‘demonstrates the not guilty plea of Mr Ongwen in its full context as a key moment in the trial’).

²¹ Impugned Decision, ICC-02/04-01/15-1523, para. 10.

²² See Impugned Decision, ICC-02/04-01/15-1523, para. 9.

²³ See Request, ICC-02/04-01/15-1527, paras 14-15.

of minimal size and the fact that their addition to the Defence list of evidence does not cause prejudice to the other parties and participants.

ii) Request for leave to appeal

13. Turning to the alternative request for leave to appeal the Impugned Decision, which remains relevant with regard to item UGA-D26-0015-1212, the Defence contends that the issue revolves around ‘whether the Single Judge has erred in his reasoning by not allowing the Defence to add items 1212, 3999, and 4000 to the LoE thereby violating his obligations under Article 64(2) of the Statute’.²⁴
14. The Single Judge considers that this ‘issue’ is not sufficiently distinct to identify as appealable issue arising from the Impugned Decision. The mere allegation by the Defence that the Single Judge erred by not allowing the addition of the items in question and thereby violated Article 64(2) of the Statute is too general in nature. In fact, it illustrates the Defence’s attempt to re-litigate the same matter which had already been the very subject of the Impugned Decision, namely the question of whether the items concerned qualify for addition to the Defence list of evidence.²⁵ As an appealable issue cannot be ‘merely a matter over which there is disagreement or conflicting opinion’, the ‘issue’ identified by the Defence as indicated above is not in fact appealable within the meaning of Article 82(1)(d) of the Statute.
15. Similarly, the reasons provided by the Defence according to which the Single Judge allegedly committed an error of reasoning which would justify reconsideration of the Impugned Decision do not suffice to render the issue more discrete. As outlined above, the Defence fails to specify to which extent the initial reasoning in the Impugned Decision was flawed, especially bearing in mind that the Defence in the Request presents arguments which it had simply not mentioned in the Initial Request. While the Defence accepts responsibility, it fails to provide any justification as to why it could not have included them in the Initial Request.

²⁴ Request, ICC-02/04-01/15-1527, para. 17.

²⁵ See also Request, ICC-02/04-01/15-1527, para. 17: ‘[...] the resolution of this issue is crucial in order to settle the matter raised in the Initial Request, namely to add items to the Defence LoE which are materially relevant to the outcome of this trial’.

16. Accordingly, the request for leave to appeal the Impugned Decision, submitted in the alternative, is also rejected.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS, on an exceptional basis, the Defence request to add items UGA-D26-0018-3999 and UGA-D26-0018-4000 to its list of evidence; and

REJECTS the Request in all other respects.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 20 June 2019

At The Hague, The Netherlands